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In the Supreme Court of the United States

OCTOBER TERM, 1959

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 837

JULIUS SILVERMAN, MEYER SCHWARTZ, AND ROBERT L. MARTIN, PETITIONERS

v.

UNITED STATES OF AMERICA

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 275 F. 2 173. The opinion of the district court (J.A. 20) is reported at 166 F. Supp. 838.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 1960 (Pet. App. 13a). A petition for rehearing *in banc* was denied on March 8, 1960 (Pet.

App. 13a). The petition for a writ of certiorari was filed on April 6, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it was error to permit the use of evidence obtained by the police from a listening post on the other side of a wall adjoining the petitioner's gambling establishment, where the sounds of voices, sometimes spoken into telephones, were magnified through the use of a battery-operated amplifier attached to a wire-like antenna inserted halfway into the party wall.

STATEMENT

In the United States District Court for the District of Columbia the petitioners were found guilty on three counts charging gambling offenses. Each of the petitioners was sentenced to imprisonment for nine months and to pay a fine of $500 on counts one and three, and to imprisonment for twenty months to five years on count two, the sentences to run concurrently (J.A. 30-34). The court of appeals affirmed, one judge dissenting.

The only issue raised is the admissibility of evidence alleged to have been obtained illegally, which also formed the basis for a search warrant. A motion to suppress was denied before trial, *United States* v. *Silverman*, 166 F. Supp. 838 (D. D.C.), on the renewal of the motion after a superseding indictment had been returned (J.A. 9, 19), and at trial (J.A. 46-53).

The evidence on this issue (some of which was stipulated at the pre-trial hearing on the motion to suppress) was as follows:

On March 15, 1958, the owners of 410 21st St., N.W., a vacant row house immediately adjoining 408, gave the Metropolitan Police a key with permission to use the premises as an observation post (J.A. 169-170). On April 22, 1958, police and federal Internal Revenue agents entered 410. They had with them a small battery operated device—a box two or three inches square, with attached amplifier and microphone, into which there was screwed a small antenna about 11¾ inches long (J.A. 71, 84, 102). One officer, using only his thumbs, pushed the antenna underneath the baseboard in a room in 410 in the one spot where he knew, from a prior test, it would penetrate (J.A. 94, 100, 115, 142). The antenna entered the 13 or 14 inch wall about half way (J.A. 61, 84, 100, 122-123, 143, 161) until it met with resistence (J.A. 110, 117). The testing officer surmised that the antenna might have hit a heating duct serving 408, but he was not looking for the duct and he was not certain of this. He knew the antenna had hit a good sounding board (R. 143-145, 158).

With the antenna in place, and with the aid of a set of earphones, the officers could hear the petitioners in 408 carrying on their betting business through both local and long distance telephone calls, quoting odds and accepting wagers (J.A. 62-64). On occasion the officers could hear and distinguish words with the naked ear (J.A. 68-69, 73, 80, 106-107, 124, 151). At times they also used an inverted water tumbler

held against the wall (106-107, 152). They listened to operations on April 22-25 (J.A. 62-68, 84-91, 120-125), and on April 29 without the mechanical device (J.A. 68-69), taking records of innumerable betting transactions (J.A. 109). On April 30, 1958, on the basis of this and other information they obtained search and arrest warrants which were executed that afternoon (J.A. 70, 126). A search of the premises revealed that three telephones were set up (and ringing constantly) in a second-floor room in which a wall had been covered with a rug and windows covered with black cloth (J.A. 128, 177). They found betting paraphernalia including bet slips, collection slips, sporting event schedules and "line" (odds quotations) sheets (J.A. 128, 131, 187-188) revealing that petitioners had accepted as much as $37,950 in bids on one day (R. 188).

The rulings below

Both the district court, in denying the petitioner's motion to suppress, and the court of appeals, in affirming the convictions below, found no violation of the Fourth Amendment or the Federal Communications Act, holding this case to be governed by *Goldman* v. *United States*, 316 U.S. 129. In the court of appeals, the dissenting judge held that, while the police action might not have violated the Fourth Amendment, it did violate a concept of ordered liberty embodied in the Fifth Amendment.

ARGUMENT

This Court has repeatedly and uniformly held that the Fourth Amendment does not ban eavesdropping. Thus in *Olmstead* v. *United States*, 277 U.S. 438, 464 (1928), in holding that the Fourth Amendment did not forbid wiretapping where no entry was made on the defendant's property, the Court noted, "The evidence was secured by the use of the sense of hearing and that only." Fourteen years later in *Goldman* v. *United States*, 316 U.S. 129 (1942), this Court relied upon, and refused to overrule *Olmstead*, in holding that the use by federal agents of a detectaphone placed against the wall of an office adjoining that of the defendants was not a violation of the Fourth Amendment. And ten years thereafter in *On Lee* v. *United States*, 343 U.S. 747 (1952), the Court again ruled that eavesdropping with the aid of a mechanical or electronic device was not within the prohibition of the Fourth Amendment. It held that the use of a "walky-talky" radio to transmit a defendant's conversation with an informer from his place of business to an agent outside had the same effect on the defendant's privacy as if the agent had been eavesdropping outside an open window, and observed (343 U.S. at 754):

> * * * It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure.

The circumstances of this case, practically indistinguishable from those of *Goldman*, *supra*, do not warrant a re-examination of this area of law. This was a conventional case of eavesdropping. The officers were stationed outside the petitioners' gambling establishment in a place where they had permission to be. From this point they overheard petitioners carrying on gambling transactions on the other side of the wall, sometimes with the naked ear, mostly with the aid of battery-operated earphones and an amplifier. The only possible distinction between this case and *Goldman* was the presence here of a small antenna, 11¾ inches in length and of the circumference of the wire in a coat hanger (see J.A. 141-142), which was pushed half-way into the party wall by the agents with their thumbs. The petitioners argued initially in their motion to suppress (R. 41, 43) that the insertion of this antenna constituted a trespass and thus distinguished this case from *Goldman*. At trial their defense was directed toward showing that the depth of penetration of the spike into the party wall was a fraction more than halfway—by the testimony of the witness most favorable to them, penetration of 7 1/8 inches into a 13 or 14 inch wall (J.A. 215). On the other hand, the testimony of three government witnesses was in agreement that the spike did not penetrate the wall beyond the half way mark (J.A. 61, 84, 122). We need not detail the evidence of the various minute calculations. The courts' holdings below represent, we think, a proper conclusion that, even if the petitioners' version of the facts be

accepted, this would not be a valid basis for distinguishing this case from *Goldman*.[1]

In this Court, the petitioners, while they do not altogether abandon the argument that there was a trespass (see Pet. 12), urge "the absurdity of requiring a 'trespass' as a condition precedent to unconstitutionality" (Pet. 10). We see no occasion in this case for arguing the effect or lack of effect of a trespass *per se* in obtaining evidence. What is an unreasonable search and seizure under the Fourth Amendment must be determined on the totality of the circumstances, and trespass has always been a factor considered by this Court in evaluating police conduct. See *Olmstead*, *supra*, 277 U.S. at 465; *Irvine* v. *California*, 347 U.S. 128, 132, 133. That it is not the decisive factor is shown by *Hester* v. *United States*, 265 U.S. 57, 58, where conduct was held reasonable even though there was a technical trespass.[2]

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[1] Thus the district court, in ruling on the motion to suppress observed (J.A. 24): "*De mininis non curat lex*. It would be, in the opinion of the Court, almost ludicrous to draw a line of distinction between legality and illegality on such minute circumstances. Moreover, the Court does not feel that inserting a wire into a party wall actually constitutes a trespass."

In the Court of Appeals, Circuit Judge Danaher speaking for the majority said (Pet. App. 9a), "We are unwilling to believe that the respective rights are to be measured in fractions of inches." Judge Washington, dissenting, noted that the question of whether a technical trespass was committed seemed immaterial to him.

[2] In *On Lee* v. *United States*, 343 U.S. at 751, the Court did not consider the effect of a trespass since it found no trespass. It noted that On Lee had seized upon "dictum" in

Our position is made clear by noting the distinctions between the circumstances of this case and those of *Irvine* v. *California*, *supra*, 347 U.S. 128, relied upon by the petitioners. There, police secretly had a key made to Irvine's home. They bored a hole in the roof. With the aid of the key they entered the home repeatedly to install a secret microphone and to move it about from time to time, even into the bedroom of Irvine and his wife, in order to get better reception at a listening post in a neighboring garage. They entered the home finally with the key to arrest Irvine and they searched the house without a search warrant. The majority of the Court, noting that such police measures would have violated the Fourth Amendment, observed that each of the entries was a trespass and probably a burglary for which an unofficial person should and probably would be severely punished.

There was no such situation here. There was no invasion of the sanctity of the home. There was in fact no physical entry, no actual, and, we believe, no technical trespass. There was no unauthorized search. There was no force nor fraud. There was only listening with the aid of an amplifier.

For these reasons the police conduct here did not violate the due process clause of the Fifth Amendment. This was not aggravated coercive conduct

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Goldman on the apparent assumption that the presence of a radio set plus a trespass would automatically bring him within what was thought to be a reservation of that question.

offensive to civilized standards of decency and fairness (cf. *Rochin* v. *California*, 342 U.S. 165); it does not represent powerful control over the personal lives of citizens (cf. *Irvine*, *supra*, 347 U.S. at 145, Mr. Justice Frankfurter dissenting). What was done here was no more than what has already been held legal. This Court can deal with abuse when abuse occurs.

Similarly, this case presents no occasion for the exercise of this Court's supervisory power over the administration of justice to formulate a rule of exclusion of evidence. The conduct of the officers did not violate a federal statute. Cf. *McNabb* v. *United States*, 318 U.S. 332. And as this Court noted in *On Lee* v. *United States*, *supra*, 343 U.S. at 755, departures from primary evidentiary criteria of relevancy and trustworthiness must be justified by some strong social policy. There are no reasons for such action here more compelling than those urged in that case.[3]

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[3] There is no merit to petitioners' argument that the facts of this case call for the consideration of whether the federal Communications Act should protect against the use of a mechanical device which transmits one side of a telephone conversation. That is a matter for Congress, not this Court. Use of such a listening device is not wiretapping within the meaning of that Act: *Goldman*, *supra*, 316 U.S. at 133-134; *Irvine* v. *California*, *supra*, 347 U.S. at 131. The case of *Rathbun* v. *United States*, 355 U.S. 107, is inapposite.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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